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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARC S. LEMCHEN

Appeal 2010-001968
Application 09/746,947
Technology Center 2400

Before JOSEPH L. DIXON, THU A. DANG, and JAMES R. HUGHES,
Administrative Patent Judges.

DANG, *Administrative Patent Judge.*

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellants appeal the Examiner's final rejection of claims 1, 10-13, and 22-26 under 35 U.S.C. § 134(a). Claims 2-9 and 14-21 have been canceled.¹ We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

A. INVENTION

According to Appellants, the invention relates biofeedback systems and the use of computer network, such as the Internet (Spec. 1, ll. 9-10).

B. ILLUSTRATIVE CLAIM

Claim 1 is exemplary and reproduced below:

1. A biofeedback system in a computer network for treating stress in a user of the computer network comprising:

a program controlled computer coupled to the computer network for executing a program to generate a modifiable schedule of stress reduction exercises personalized to the user and which stress reduction exercises are to be performed by the user interactively through use of the computer, the computer receiving biofeedback input from the user, the program controlled computer monitoring compliance by the user with the schedule of stress reduction exercises, the schedule being modifiable according to the compliance of the user with the schedule, according to the performance of the user in the stress reduction exercises, according to situational events to which the user is subjected, according to biofeedback from the user during performance of the stress reduction exercises or at times other than

¹Although claim 24 depends from canceled claim 14, we consider such failure to amend claim 24 after canceling claim 14 to be an oversight by Appellants. Since canceled claim 14 depends from independent claim 13, we will treat dependent claim 24 as depending from independent claim 13.

during the performance of the stress reduction exercises, according to information input into the computer by the user relating to personalized stress characteristics of the user, and/or according to information input into the computer by the user relating to personalized stress related history of the user, and

at least one sensor to sense body stress signals from the user to provide the automatic biofeedback input to the computer, the body stress signals being communicated to the computer.

C. REJECTIONS

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Pyles

US 2002/0055418 A1

May 9, 2002

Claims 1, 10-13, and 22-26 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Pyles.

II. ISSUE

Has the Examiner erred in finding that Pyles teaches a computer to generate “a modifiable schedule of stress reducing exercises,” and a sensor to sense “body stress signals from the user to provide the automatic biofeedback input to the computer” (claim 1).

III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

Pyles

1. Pyles discloses a fitness device that uses an Internet link to connect to a special web site portal where a data base of health and exercise information is processed, wherein when the Internet site portal is accessed a special data base having the user's personal workout and health history can be accessed, and the user can upload and display all pertinent exercise information, including workout history, goals, fitness programs (p. 1, [0010]).
2. The web link and computers can generate control signals that adjust the fitness device to increase or decrease resistance and workout times to maintain a user's heart rate and exercise regimen, and goals for fitness can be input by the user through an operator interface, and the web site to computer will track progress, set new goals, or provide health information for the user (*id.*).

IV. ANALYSIS

As to independent claim 1, Appellant contends that “[Appellant’s] stress reduction exercises are conventional mental exercises, breathing or relaxation exercises” and “not exercises to provide for physical fitness” (App. Br. 3). In contrast, Appellant contends that “[n]owhere does Pyles refer to emotional or neurological stress reduction exercises or to user biofeedback” (App. Br. 7). Though Appellant admits that Pyles discloses

“exercises” and “biofeedback signal,” Appellant argues that “[t]he only biofeedback signal which is mentioned [in Pyles] is heart rate” and that “adjustment of resistance and workout times [in Pyles] is directed to cardiovascular exercise and not to meditation or relaxation” (App. Br. 8-9). Appellant then argues that “[t]he referenced history in Pyles is a personal workout and health history and not stress-related history” (App. Br. 10).

The Examiner responds that “the proper exercise will inherently reduce stress, over exercise will result in stress, and under exercise will not improve stress” (Ans. 7-8). The Examiner points out that “[Appellant’s] sensor include[s] pressure monitor, heart monitor, etc.” and finds that “Pyles discloses sensing the heart-rate signal from the user using a sensor” (*id.*). The Examiner then finds that “[a] schedule is timetable” and “Pyles discloses computer generate control signal to increase/decrease resistance and workout time,” wherein “[t]he workout times is equate to the schedule” (Ans. 9). Further, the Examiner finds that “the broadest reasonable interpretation for ‘stress factor’ is the ‘health information’ related to the user” (Ans. 8).

Appellant’s arguments that Appellant’s exercises “are conventional mental exercises, breathing or relaxation exercises” (App. Br. 3), and that Pyles does not disclose “emotional or neurological” exercises (App. Br. 7) are not commensurate in scope with the language of claim 1. In particular, claim 1 does not require that the exercise be “mental,” “breathing,” “relaxing,” “emotional” or “neurological” exercises. That is, nothing in claim 1 precludes the “stress reducing” exercises from also “being for physical fitness,” contrary to Appellant’s arguments (App. Br. 3). Similarly,

though Appellant argues that Pyles' workout time is for "cardiovascular exercise" (App. Br. 8-9), nothing in claim 1 precludes the "modifiable schedule of stress reducing exercises" to also be for cardiovascular exercises.

Pyles discloses a fitness device that uses an Internet link, wherein the user can upload workout history, goals, and fitness programs (FF 1), and wherein the web link and computers can generate control signals that adjust the fitness device to increase/decrease workout times, track progress, or set new goals (FF 2). We find Pyles to teach a computer that generates a modifiable schedule of exercises. That is, we find no error in the Examiner's finding that finds that "[a] schedule is timetable" and "Pyles discloses computer generate control signal to increase/decrease resistance and workout time," wherein "[t]he workout times is equate to the schedule" (Ans. 9).

We also find no error in the Examiner's finding that stress can be reduced through exercise (Ans. 7-8). Accordingly, we find "stress reducing exercises" to read on Pyles' exercises.

Furthermore, we find claim 1's "stress reduction" is non-functional descriptive material that cannot distinguish the claimed exercises from the exercises of Pyles. That is, claim 1 does not recite any additional step of reducing stress but rather merely recite "stress reduction exercises." Therefore, the adjective "stress reduction" is merely a label that modifies the exercises. Our reviewing court has held that non-functional descriptive material cannot lend patentability to an invention that would have otherwise been anticipated by the prior art. *See In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). *Cf. In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983) (when

descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability).

We note also that Appellant's Specification indicates an example in which stress reducing exercises include "stretching exercises" (Spec. 9, ll. 1-3). Thus, though Appellant argue that Pyles' exercises are "for physical fitness" (App. Br. 3), we find no patentable distinction between the claimed "stress reducing exercises" of claim 1 and the exercises of Pyles.

Although Appellant also contends that "[n]owhere does Pyles refer to ... user biofeedback" (App. Br. 7), Appellant admits that the "biofeedback signal which is mentioned [in Pyles] is heart rate" (App. Br. 8). We find no error in the Examiner's finding that "Pyles discloses sensing the heart-rate signal from the user using a sensor" (Ans. 8). As the Examiner points out, "[Appellant's] sensor include[s] pressure monitor, heart monitor, etc." (*id.*). Since Pyles discloses monitoring heart rate and the computer will track progress (FF 2), we find Pyles to disclose a sensor to sense "body stress signals from the user to provide the automatic biofeedback input to the computer" as required by claim 1.

Although Appellant also argues that "[t]he referenced history in Pyles is a personal workout and health history and not stress-related history" (App. Br. 10), we note that claim 1 does not require a "stress-related history." That is, claim 1 merely requires that the schedule is modifiable "according to the compliance of the user with the schedule, ... and/or according to information input into the computer by the user relating to personalized stress related history of the user" (claim 1, emphasis added). That is, claim 1 merely requires only one of the conditions for modification.

Furthermore, the term “relating to personalized stress related history of the user” is non-functional descriptive material that describes the information being input without affecting how the information is input. The descriptive material will not distinguish the invention from the prior art in terms of patentability.

Nevertheless, we find no error in the Examiner’s finding that “the broadest reasonable interpretation for ‘stress factor’ is the ‘health information’ related to the user” (Ans. 8). That is, we find no patentable distinction between the claimed “stress related history” of claim 1 and the health history of Pyles.

Accordingly, for the above reasons, we affirm the rejection of claim 1 under 35 U.S.C. § 102(e).

As for independent claim 13, Appellant merely lists the claim language and then repeats the arguments for claim 1 (App. Br. 10-13). Similarly, Appellant does not provide separate arguments for independent claims 25 and 26 (App. Br. 13-14). A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. *See* 37 C.F.R. § 41.37(c)(1)(vii). *See also In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); and *Ex parte Belinne*, No. 2009-004693, 2009 WL 2477843, at *3-4 (BPAI Aug. 10, 2009) (informative). Furthermore, as discussed above with respect to claim 1, we find no error with the rejection over Pyles. Accordingly, claims 13, 25, and 26, and claims 10-12, 22-24 depending respectively from claims 1 and 13 fall with claim 1.

V. CONCLUSIONS AND DECISION

Appellant have not shown that the Examiner erred in finding that claims 1, 10-13, and 22-26 are anticipated 35 U.S.C. § 102(e).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

pgc